No. .....

Supreme Court of the United States

October Term, 1932.

WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; THE CITY OF CHEYENNE, a municipal corporation; and THE CITY OF ROCK SPRINGS, a municipal corporation,

Petitioners,

v.

BOEING AIR TRANSPORT, INC., a corporation,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

JOHN W. LACEY,
Cheyenne, Wyoming,
ELMER E. TODD,
FRANK E. HOLMAN,
WILLIAM M. ALLEN,
CLARENCE R. INNIS,
Seattle, Washington,
Attorneys for Respondent.

Hoge Building,
Seattle, Washington.

SUBJECT INDEX.

Brief Page

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI:

I. OPINIONS OF THE COURTS BELOW 3

II. JURISDICTION 4

III. STATEMENT OF THE CASE 4

IV. SUMMARY OF ARGUMENT 8

V. ARGUMENT 9

Point I. PETITIONERS' CONTENTION THAT THE CIRCUIT COURT OF APPEALS HELD THE WYOMING GASOLINE TAX ACT INVALID WITH RESPECT TO GASOLINE PURCHASED OUTSIDE OF THE STATE IS ERRONEOUS 9

Point II. IF PETITIONERS ARE CORRECT IN THEIR CONTENTION THAT THE CIRCUIT COURT OF APPEALS DID HOLD INVALID THE TAX IMPOSED BY THE WYOMING GASOLINE TAX ACT ON GASOLINE PURCHASED BY RESPONDENT OUTSIDE OF THE STATE OF WYOMING AND THEREAFTER IMPORTED INTO SAID STATE FOR USE IN ITS AIRPLANES IN INTERSTATE COMMERCE, SUCH DECISION IS IN FULL ACCORD WITH THE DECISIONS OF THIS COURT 12

TABLE OF CASES CITED:

Boeing Air Transport, Inc. v. Edelman, et al., 51 Fed. (2) 130 3

Boeing Air Transport, Inc. v. Edelman, et al., 61 Fed. (2) 319 3

Eastern Air Transport, Inc. v. South Carolina Tax Commission, et al., 285 U. S. 147 ..... 13, 15

Forsyth v. Hammond, 166 U. S. 506 12

Gregg Dyeing Co. v. Query, 286 U. S. 472 16

Helson v. Kentucky, 279 U. S. 245 ..... 7, 14, 16

TABLE OF STATUTES CITED:

§240(a), Act of February 13, 1925, ch. 229, 43 Stat. L. 936 (U. S. C., Title 28, §347(a)) 4

Ch. 115, Art. 11, Wyoming Rev. Stat. 1931 7

TABLE OF RULES CITED:

Supreme Court Rule 38 ..... 4, 11

No. .....

Supreme Court of the United States

October Term, 1932.

WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; THE CITY OF CHEYENNE, a municipal corporation; and THE CITY OF ROCK SPRINGS, a municipal corporation,

Petitioners,

v.

BOEING AIR TRANSPORT, INC., a corporation,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I.
OPINIONS OF THE COURT BELOW.

The opinion of the United States District Court is reported in 51 Fed. (2) 130 and is at p. 118 of the Record.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit is reported in 61 Fed. (2) 319 and is at p. 134 of the Record.

II.

JURISDICTION.

By reason of Section 240 (a), Act of February 13th, 1925, ch. 229; 43 Statutes at Large 936 (U. S. C., Title 28, Sec. 347 a) this Court has jurisdiction to grant the petition for writ of *certiorari*. However, as hereinafter pointed out, the reasons usually required by this Court for the issuance of a writ of *certiorari* are entirely lacking in this case (Rule 38 of this Court).

III

STATEMENT OF THE CASE.

As a statement of the case petitioners content themselves with a quotation from the opinion of the Circuit Court of Appeals. The summary of facts in this quotation in some material respects includes deductions by the writer of the opinion which are not supported by the Record and are not concurred in by the other members of the Court. Respondent therefore deems it advisable to make a complete statement of the case as disclosed by the Record.

In this case respondent sought to enjoin the State Treasurer of Wyoming from exacting payment of a tax imposed under the laws of Wyoming with respect to gasoline used by the airplanes of respondent while engaged in interstate commerce and to re-

cover certain sums paid as taxes, under protest (R. 11-12, 6, 45).

Respondent is a corporation organized under the laws of the State of Washington and qualified to do business in the State of Wyoming (R. 2, 61). The petitioner William H. Edelman was State Treasurer of Wyoming at the time of the institution of the action (R. 31). The petitioner Harry R. Weston was State Treasurer of Wyoming at the time the case came on for trial in the District Court (R. 47). Both Edelman and Weston are residents of the State of Wyoming (R. 47). The petitioners, the City of Cheyenne and the City of Rock Springs, are municipal corporations organized under the laws of the State of Wyoming and, as such, are residents of that State (R. 47, 48).

Respondent is engaged in the transportation by air of mail, passengers and express, between the cities of Chicago, Illinois and San Francisco, California (R. 89). Mail is carried under contract with the United States Government; express and passengers are carried for hire (R. 63, 89). Gasoline is used as fuel to propel the airplanes of respondent (R. 89).

The planes of the respondent land in Wyoming at the Cities of Cheyenne and Rock Springs (R. 101). The first stop to the east of Cheyenne is North Platte,

Nebraska, and the first stop to the west of Rock Springs is Salt Lake City, Utah (R. 101). The amount of intrastate commerce, as compared with the interstate commerce in Wyoming, is insignificant, and the interestate and the intrastate transportation of mail, passengers and express are so commingled that it would be impossible to apportion the tax between them (R. 94-95, 49).

The gasoline that is placed in the respondent's planes at Cheyenne and Rock Springs, Wyoming, is stored in the tanks of the respondent at the Cheyenne and Rock Springs airports and at the time it is taken from the tanks for use, a record is made of the amount used in interstate commerce and the amount used locally (R. 97-98). The tax is collected by the State Treasurer after the gasoline is used by the respondent (R. 97).

The taxes on gasoline which is used locally are paid without protest (R. 103). The taxes on gasoline used in respondent's planes as the fuel to propel the planes in interstate commerce are paid under protest, and these are the taxes which are the subject of this action (R. 93, 103). The protested taxes are paid in order to avoid the heavy penalties imposed by the Wyoming laws for non-payment (R. 90-91).

The taxes involved in this action were imposed by the State of Wyoming with respect to gasoline

placed in the planes of respondent in the State of Wyoming between March 15, 1930, and May 12, 1931, for use in interstate commerce (R. 55-56). The taxes paid under protest by respondent to the State of Wyoming during this period were in excess of $15,000.00 (R. 55-56).

The tax in question is imposed by ch. 115, Art. 11, Wyoming Revised Statutes for 1931, a copy of which is set forth in the appendix to petitioner's brief on file herein.

The gasoline with respect to which the tax in question was imposed was purchased by respondent both within and without the State of Wyoming (R. 97). On or before the 15th day of each month, the respondent paid to the State Treasurer the tax on all gasoline consumed by the respondent during the preceding calendar month (R. 99).

The District Court held that the tax in question, irrespective of whether the gasoline was acquired within or without the State of Wyoming, was a tax upon the *use* of gasoline. The Court recognized that, under the decision of this Court in *Helson v. Kentucky*, 279 U. S. 45, a tax imposed upon the use of gasoline in interstate commerce is an unlawful burden upon that commerce. The District Court held, however, that inasmuch as the proceeds of the tax were turned over by the State to the Cities of Chey-

enne and Rock Springs for the maintenance and improvement of their airports which were used by the respondent, the tax was in effect an exaction of compensation for the use of these airports and consequently was not an unlawful burden upon interstate commerce (R. 118-131).

The Circuit Court of Appeals held that the tax in question was a license tax on the wholesaler of gasoline which required the wholesaler to pay a tax upon the sale or use of all gasoline sold or used by him in Wyoming; that respondent was required to pay the tax with respect to gasoline purchased by respondent from a wholesaler in Wyoming but that the tax did not apply with respect to gasoline purchased by the respondent outside of the State of Wyoming (R. 134-144).

IV.

SUMMARY OF ARGUMENT.

I. Petitioners' contention that the Circuit Court of Appeals held the tax in question invalid as to gasoline purchased outside of the State is erroneous. The Circuit Court of Appeals took the view that the Wyoming Act merely imposed a license tax upon persons engaged in selling gasoline as wholesalers in the State and that therefore no tax could be collected under the statute in question as to gasoline purchased by respondent outside of Wyoming.

II. If petitioners are correct in their contention that the Circuit Court of Appeals held the Wyoming tax invalid with respect to gasoline purchased by respondent outside of Wyoming, the decision of the Circuit Court is in full accord with the decisions of this Court.

V.

ARGUMENT.

Point I.

Petitioners' Contention That the Circuit Court of Appeals Held the Wyoming Gasoline Tax Act Invalid With Respect to Gasoline Purchased Outside of the State Is Erroneous.

On the second page of petitioners' brief (p. 8 of petition and brief) the petitioners make the following statement:

> "The opinion of the United States Circuit Court of Appeals for the Tenth Circuit sustains the tax as legal on all such gasoline procured by respondent on purchases within the State of Wyoming and holds the tax to be illegal on all such gasoline procured by respondent on purchases outside the State of Wyoming and then brought into said state and used in propelling its airplanes in interstate commerce."

As we read the opinion of the Circuit Court of Appeals, that Court did not attempt to pass upon

the *validity* of the Wyoming Gasoline Tax Act as applied to gasoline purchased by respondent outside of the State. The Circuit Court simply held that the Wyoming Act did not apply with respect to such gasoline. Respondent does not agree with the Circuit Court in its conclusions as to the nature of the tax imposed. Respondent has consistently taken the position throughout this case that the tax imposed upon respondent with respect to gasoline purchased both within and without Wyoming is a tax upon the *use* of gasoline. The Circuit Court of Appeals, however, construes the Wyoming Act as imposing a license tax upon persons engaged in selling gasoline as wholesalers in Wyoming. As to gasoline purchased by the respondent from a wholesaler in Wyoming, the Court said that the wholesaler was obligated to pay the tax and that when respondent itself paid the tax it was simply discharging the primary obligation of the wholesaler. The Court sets forth its view in this connection in the following language:

> "The tax here under consideration is the license tax against the wholesaler exacted of him for the privilege of carrying on the business of selling gasoline, and when appellant made its purchase it had an option under the statute of then paying the tax added to the purchase price, or of assuming its payment and accounting to the State Treasurer therefor after it had used the gasoline. It chose to do the latter and thus

discharged a primary obligation of the wholesaler."

The view of the character of the tax imposed by the Wyoming Statute (thus expressed by the Circuit Court of Appeals) necessarily excluded from the operation of the statute the gasoline purchased by the respondent outside the State of Wyoming. The Circuit Court of Appeals has so held, and directed that an injunction issue against the collection of any tax with respect to the gasoline purchased by the respondent outside the State of Wyoming for use in fueling its planes in interstate commerce. The fact that the injunction is limited to gasoline used in interstate commerce does not militate against the view that the Circuit Court of Appeals held the tax inapplicable to gasoline purchased outside of the State rather than invalid as applied to gasoline used in interstate commerce. The limitation with respect to the injunction is apparently derived from the nature of the issues originally presented by the pleadings and the respondent's brief on appeal to the Circuit Court of Appeals.

If respondent is correct in its interpretation of the decision of the Circuit Court of Appeals it is clear that the usual reasons for granting a petition for a writ of *certiorari*, as outlined in Rule 38 of this Court, do not exist in this case. The decision of the Circuit Court of Appeals is not in conflict with the

decisions of other Circuit Courts or of the Courts of the State of Wyoming. The decision is not in conflict with the weight of authority and no important question of Federal law is involved in the decision. The decision rests solely upon the construction placed upon the Wyoming Gasoline Tax Act by the Circuit Court. It therefore appears that no sufficient reason exists for a review of the case by this Court.

Forsyth v. Hammond, 166 U. S. 506.

Point II.

If Petitioners Are Correct in Their Contention That the Circuit Court of Appeals Did Hold Invalid the Tax Imposed by the Wyoming Gasoline Tax Act on Gasoline Purchased by Respondent Outside of the State of Wyoming and Thereafter Imported Into Said State for Use in Its Airplanes in Interstate Commerce, Such Decisions Is in Full Accord With the Decisions of This Court.

The petitioners' position as to the nature of the tax is not clear, although petitioners recognize that it is an excise tax. (See page 8 of petition and brief.) The Wyoming Act is similar to many state gasoline tax statutes in that it imposes a tax upon the sale or use of gasoline. If the Wyoming Gasoline Tax Act applies to gasoline purchased by respondent outside of the State of Wyoming it must attach to the *use* of

that gasoline. Inasmuch as the gasoline was purchased by respondent outside the jurisdiction of the State, there is no act to which the tax may attach other than the *use* of the gasoline.

Petitioners contend that inasmuch as the gasoline purchased by respondent outside of Wyoming came to rest in Wyoming before it was consumed by respondent's planes, such gasoline was subject to the tax in question. Petitioners state that the tax is levied on gasoline which has acquired "a fixed *situs* within the State of Wyoming." This statement is not supported by the language of the statutes. The tax is not based upon the *situs* of the gasoline but upon its *sale* or *use*.

Respondent agrees that a State may validly impose a property tax upon property within its borders, even though that property is used in interstate commerce. The respondent does in fact pay property taxes to the State of Wyoming on gasoline held by it in that State for use in interstate commerce (R. 105). Furthermore, a State may impose excise taxes on purely intrastate transactions which are only remotely connected with interstate commerce. (See *Eastern Air Transport, Inc. v. South Carolina Tax Commission et al.*, 285 U. S. 147.) But in the instant case the particular act that is taxed is the *use* of gasoline—and that use is in interstate commerce.

The tax being imposed upon the *use* of gasoline, the fact that the gasoline came to rest within the State of Wyoming is unimportant. Irrespective of where the gasoline was situated at the time it was placed in the planes of respondent, the tax did not attach until that gasoline was actually used. Inasmuch as the use of that gasoline was in interstate commerce, the tax constituted an unlawful burden upon that commerce, under the decisions of this Court.

In the case of *Helson v. Kentucky*, 279 U. S. 245, decided by this Court in 1929, the plaintiffs in error operated a ferry boat on the Ohio River between Kentucky and Illinois, doing an exclusively interstate business. The gasoline which was used to operate the ferry boat was purchased in the State of Illinois, but about seventy-five per cent of it was consumed in the State of Kentucky. Under the Kentucky law a tax was imposed upon the sale or use of gasoline within the borders of the State. This Court, in holding that the imposition of this tax upon the use of gasoline within the State of Kentucky constituted an unlawful burden upon interstate commerce, said:

> "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car em-

ployed in such commerce. A tax laid upon the use of the ferryboat would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the states.' *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 214, 29 L. Ed. 165, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826."

Petitioners, in their brief, have referred to the case of *Eastern Air Transport, Inc., v. South Carolina Tax Commission et al.*, 285 U. S. 147. In that case this Court sustained a tax on the sale of gasoline, although the gasoline was thereafter used in propelling airplanes in interstate commerce. It was held that the sale was purely a local transaction and the effect of the tax on such commerce was no greater or different than a general property tax upon the

same property would be. This Court recognized, however, that a general property tax or a tax upon purely local sales is manifestly different from a tax "laid directly upon the use of gasoline in interstate transportation." In the Eastern Air Transport case this Court recognized and approved the rule laid down in *Helson v. Kentucky* that a tax imposed upon the use of gasoline, when that use is in interstate commerce, constitutes an unlawful burden upon that commerce.

The petitioners also refer to the case of *Gregg Dyeing Co. v. Query*, 286 U. S. 472. In this case a tax was sustained upon the use of gasoline purchased outside of the State and imported for use in a cleaning business carried on solely within the State. However, this Court recognized that a tax imposed upon the use of gasoline, in interstate commerce is invalid, saying:

> "There is an exception in the case of a tax directly on use in interstate commerce as on use in interstate transportation. *Helson v. Kentucky*, 279 U. S. 245, 252; *Eastern Air Transport v. South Carolina Tax Commission*, decided March 14, 1932."

It cannot be questioned that under the decisions of this Court a tax imposed upon the use of gasoline in interstate commerce constitutes a violation of the commerce clause of the Federal constitution. If the petitioners are correct in their contention that the

Circuit Court of Appeals did hold the Wyoming Gasoline Tax unconstitutional with respect to gasoline purchased outside of the State, then it must be said that that Court was following the decisions of this Court. As we have heretofore stated, it is our opinion that the Circuit Court of Appeals does not rest its decision upon any constitutional ground. However, if the Circuit Court of Appeals did intend to pass upon the constitutionality of the Wyoming Gasoline Tax Act, as applied to gasoline purchased outside of the State, it was clearly correct in reaching the result that it did. If the Wyoming Gasoline Tax Act does apply to gasoline purchased outside of the State it must attach to the *use* of that gasoline and, under the decisions of this Court heretofore referred to, the tax imposed upon the *use* of gasoline in interstate commerce is clearly invalid.

Respectfully submitted,

JOHN W. LACEY,
Cheyenne, Wyoming.
ELMER E. TODD,
FRANK E. HOLMAN,
WILLIAM M. ALLEN,
CLARENCE R. INNIS,
Seattle, Washington.

Hoge Building,
Seattle, Washington.

Attorneys for Respondent.

No. 571

Supreme Court of the United States

OCTOBER TERM, 1932.

WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; THE CITY OF CHEYENNE, a municipal corporation; and THE CITY OF ROCK SPRINGS, a municipal corporation,

Petitioners.

v.

BOEING AIR TRANSPORT, INC., a corporation,

Respondent.

Respondent's Supplemental Brief

JOHN W. LACEY,
Cheyenne, Wyoming;

ELMER E. TODD,
FRANK E. HOLMAN,
WILLIAM M. ALLEN,
CLARENCE R. INNIS,
Attorneys for Respondent.

1006 Hoge Building,
Seattle, Washington.

SUBJECT INDEX.

RESPONDENT'S SUPPLEMENTAL BRIEF.

Page

THE FACT SITUATION AND THE QUESTION INVOLVED.. 4

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND ITS INTERPRETATION OF THE WYOMING STATUTE..... 5

SUMMARY OF ARGUMENT..... 6

ARGUMENT 7

I. THE RECENT DECISION OF THIS COURT IN THE CASE OF THE NASHVILLE-CHATTANOOGA & ST. LOUIS RY. CO. v. WALLACE, NO. 176, OCTOBER TERM, 1932, DECIDED FEBRUARY 6, 1933, DOES NOT GOVERN THE CASE AT BAR..... 7

II. THE USE WHICH IS THE SUBJECT OF THE WYOMING GASOLINE TAX IS NOT STORAGE OR WITHDRAWAL FROM STORAGE, BUT ACTUAL CONSUMPTION IN OPERATION OF RESPONDENT'S PLANES IN INTERSTATE COMMERCE AND, UNDER THE DECISION OF HELSON v. KENTUCKY, 279 U. S. 245, A TAX UPON SUCH USE CONSTITUTES AN UNLAWFUL BURDEN UPON THAT COMMERCE 10

III. THE ACT UNDER WHICH THIS TAX IS IMPOSED IS PURELY A REVENUE MEASURE AND ITS IMPOSITION UPON THE USE OF GASOLINE BY THE RESPONDENT'S PLANES IN INTERSTATE COMMERCE IS IN NO SENSE AN EXACTION OF COMPENSATION FOR THE USE OF THE CHEYENNE AND ROCK SPRINGS AIRPORTS..... 16

(A) The power to exact compensation for the use of municipal airports is in the municipality owning the airport and is not in the State of Wyoming..... 18

(B) There is no sufficient relation between the gasoline tax and the use made of the airports to justify holding that the tax is a charge made merely as compensation for such use..... 19

INDEX—*Continued*

Page

IV. IF THE TAX IMPOSED ON GASOLINE TAKEN INTO RESPONDENT'S PLANES ON THE CHEYENNE AIRPORT FOR USE IN INTERSTATE COMMERCE IS CONSTRUED AS AN EXACTION OF COMPENSATION FOR THE USE OF THE CHEYENNE AIRPORT, IT IS IN VIOLATION OF SECTION 10, ARTICLE I, OF THE CONSTITUTION OF THE UNITED STATES BECAUSE IT IMPAIRS THE OBLIGATION OF THAT CONTRACT BETWEEN THE RESPONDENT AND THE CITY OF CHEYENNE DATED JULY 1, 1929, AND ENTERED INTO PRIOR TO THE EFFECTIVE DATE OF THE STATUTE UNDER WHICH THE TAX IS IMPOSED 23

CONCLUSION 26

TABLE OF CASES CITED:

Billings v. U. S., 232 U. S. 261 12

Boise Artesian H. & C. Water Co. v. Boise City, 230 U. S. 84 .. 25

Bowman v. Continental Oil Co., 256 U. S. 642 14

Carondelet Canal Co. v. Louisiana, 233 U. S. 362 26

Coolidge v. Long, 282 U. S. 582 26

Dartmouth College v. Woodward, 4 Wheat. 518 26

Eastern Air Transport v. South Carolina Tax Comm., 285 U. S. 147 ..... 15, 16

Hart Refineries v. Harmon, 278 U. S. 499 14

Helson v. Kentucky, 279 U. S. 245 ..... 6, 8, 10, 14, 16, 26

Interstate Transit, Inc. v. Lindsey, 283 U. S. 183 19

Murray v. Charleston, 96 U. S. 432 26

Sprout v. South Bend, 277 U. S. 163 22

State Freight Tax Case, 15 Wall. 232 14

The Nashville-Chattanooga & St. Louis Ry. Co. v. Wallace, No. 176, October Term, 1932 (dec. Feb. 6, 1933) 6, 7, 14, 15, 16

TABLE OF STATUTES CITED:

§10, Art. I of U. S. Constitution 7, 24, 27

Wyoming Session Laws, 1923 to 1929, incl. ..... Appendix

No. 571

Supreme Court of the United States

OCTOBER TERM, 1932.

WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; THE CITY OF CHEYENNE, a municipal corporation; and THE CITY OF ROCK SPRINGS, a municipal corporation,

Petitioners,

v.

BOEING AIR TRANSPORT, INC., a corporation,

Respondent.

Respondent's Supplemental Brief

This brief is a supplement to the brief for the respondent in opposition to the petition for a writ of certiorari heretofore submitted to this Court. All references herein will be to the paging of the printed record in this Court and will be marked with the letter "R."

THE FACT SITUATION AND THE QUESTION INVOLVED.

Respondent, BOEING AIR TRANSPORT, INC., is engaged in transportation in interstate commerce by airplane (R. 89). It uses two municipally-owned airports in the State of Wyoming (R. 68-100). Gasoline is the fuel used for propelling the airplanes (R. 89, 102). Boeing Air Transport, Inc., purchases its gasoline both inside and outside the State of Wyoming and maintains storage facilities at the airports (R. 97). A small amount of local transportation business is carried on, but the gasoline used in the local business cannot be separated from that used in the interstate commerce business (R. 89, 94, 95, 102). A small amount of gasoline is sold by Boeing Air Transport, Inc., at the airports to other users (R. 90, 100). Some gasoline is used for testing and washing motors and for automobiles (R. 93). The balance of the gasoline is used for flights from the airports at Cheyenne and Rock Springs, in Wyoming, to points outside that State (R. 93, 103). The gasoline so used is the basis of the controversy before this Court (R. 5-6, 44, 93).

The question involved on this review of the judgment of the Circuit Court of Appeals for the Tenth Circuit is simply this: Can the respondent Boeing Air Transport, Inc., be required to pay to the State of Wyoming, under the present statute, a tax meas-

ured by the quantity of gasoline imported by it and used for flights from points in Wyoming to points in other States?

The Wyoming statute in question is set out in an appendix to the petition for a writ of certiorari, but, as so set out, does not include the titles of the various Acts and does not show the relation of the various amendments to the original Act. For this reason we are setting out in an appendix to this brief the Acts as passed by the Wyoming legislature.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND ITS INTERPRETATION OF THE WYOMING STATUTE.

Respondent contended in its brief in opposition to the petition for writ of certiorari that the Circuit Court of Appeals did not hold the Wyoming Gasoline Tax *invalid* with respect to gasoline purchased by respondent outside of Wyoming. It is respondent's opinion that the Circuit Court took the view that the Wyoming Gasoline Tax Act did not *apply* with respect to such gasoline. Petitioners in their supplemental brief have made no attempt to reply to this contention.

Respondent respectfully directs this Court's attention to Point I of the Argument in respondent's

brief in opposition to the petition wherein this contention is set forth. Hereinafter this brief will be in answer to petitioners' arguments which assume that the Circuit Court of Appeals did in fact hold the Wyoming Act *invalid* with respect to gasoline purchased by respondent outside of Wyoming.

SUMMARY OF ARGUMENT.

I. The recent decision of this Court in the case of *The Nashville-Chattanooga & St. Louis Ry. Co. v. Wallace,* No. 176, October Term, 1932, decided February 6, 1933, does not govern the case at bar.

II. The use which is the subject of the Wyoming Gasoline Tax is not storage or withdrawal from storage, but actual consumption in operation of respondent's planes in interstate commerce, and, under the decision of *Helson v. Kentucky,* 279 U. S. 245, a tax upon such use constitutes an unlawful burden upon that commerce.

III. The Act under which this tax is imposed is purely a revenue measure and its imposition upon the use of gasoline by the respondent's planes in interstate commerce is in no sense an exaction of compensation for the use of the Cheyenne and Rock Springs airports.

IV. If the tax imposed on gasoline taken into respondent's planes on the Cheyenne airport for use

in interstate commerce is construed as an exaction of compensation for the use of the Cheyenne airport, it is in violation of Section 10, Article I, of the Constitution of the United States because it impairs the obligation of that contract between the respondent and the City of Cheyenne dated July 1, 1929, and entered into prior to the effective date of the statute under which the tax is imposed.

ARGUMENT.

I.

The Recent Decision of This Court in the Case of The Nashville-Chattanooga & St. Louis Ry. Co. v. Wallace, No. 176, October Term, 1932, Decided February 6, 1933, Does Not Govern the Case at Bar.

In petitioner's supplemental brief great reliance is placed upon *The Nashville-Chattanooga & St. Louis Ry. Co. v. Roy C. Wallace, Comptroller, et al.*, No. 176, a decision of this Court announced February 6, 1933. In this case a tax imposed upon the storage and withdrawal from storage of gasoline was upheld, although the gasoline, after its withdrawal from storage, was used in interstate commerce. A sharp distinction was drawn between a tax imposed upon a transaction completed prior to the use of gasoline in interstate commerce, and a tax upon the use of the gasoline. It was held that since the storage and withdrawal from storage of gasoline was completed prior to its use in inter-

state commerce, the tax did not impose an unlawful burden upon that commerce. This Court said:

> "The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements. See *Bromley v. McCaughn*, 280 U. S. 124, 136-138. Hence, there can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson v. Kentucky, supra*. Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. See *Eastern Air Transport v. Tax Commission*, 285 U. S. 147."

The doctrine of *Helson v. Kentucky*, 279 U. S. 245, that a tax upon the use of gasoline in interstate commerce is an unlawful burden upon that commerce was again approved by this Court, as follows:

> "We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, subsequent to the incidence of the tax, as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation

of interstate commerce or gross receipts derived from it, are beyond the State taxing power, *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 470; *Sprout v. South Bend*, 277 U. S. 163, 170, 171; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 297, and a tax levied upon the use of gasoline in generating motive power for a ferry boat used exclusively in interstate commerce has been held to be so direct and immediate a burden on the commerce itself as to be invalid. *Helson v. Kentucky*, 279 U. S. 245."

Petitioners' argument, in their supplemental brief, resolves itself into this proposition: that inasmuch as the gasoline acquired by respondent outside of Wyoming and brought into that State for use could lawfully have been subjected to a tax under a statute similar to the Tennessee Act involved in the *Wallace* case, therefore the tax in the instant case is valid. The petitioners cite cases in support of the proposition that this Court will "regard the substance, rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the State." We are quite in accord with the petitioners in their desire to have this Court regard the substance of this Act rather than the form. However, petitioners are in effect asking this Court to amend the statute and impose a tax upon the storage of gasoline instead of upon its use.

II.

The Use Which Is the Subject of the Wyoming Gasoline Tax Is Not Storage or Withdrawal From Storage, but Actual Consumption in Operation of Respondent's Planes in Interstate Commerce and, Under the Decision of Helson v. Kentucky, 279 U. S. 245, a Tax Upon Such Use Constitutes an Unlawful Burden Upon That Commerce.

The petitioners in their supplemental brief for the first time make the point that the subject of the tax in question is the storage and withdrawing from storage by the respondent of the gasoline used by it.

On page 4 of their supplemental brief the petitioners say:

> "Respondent stores and withdraws the gasoline on which petitioners collect the tax. Respondent uses the gasoline at the municipal air field; *that is, it stores and withdraws the gasoline at the air field.* Petitioners are not taxing the use of gasoline in generating motive power after it is withdrawn from respondent's storage tanks. If they were they would tax all gasoline so used from the time respondent's airplanes crossed the State line, as was attempted in the *Helson* case." (Italics are ours.)

It is apparent from this quotation that the petitioners base their present position upon the facts alone that the respondent stores at the airports the gasoline which it uses, and likewise withdraws the gasoline which operates its planes in interstate commerce from

that storage. The undisputed evidence as to the nature of the tax and the method of its collection shows clearly the unsoundness of petitioners' argument. On cross-examination, Mr. D. B. Colyer testified (R. 100), as follows:

> "Our method of making the payments is as directed by the State. For illustration, during the month of June we paid the taxes on gasoline used during May, and these were to be paid before the 15th of the month subsequent to that in which the gasoline was used. None of the tax is paid in advance of the use. It is all paid on the 15th of the month after it is used."

The fact that petitioners do not attempt to tax gasoline in the tanks of respondent's planes as they cross the Wyoming boundary lends no color to petitioners' contention. It would be highly impracticable, if not impossible, to impose a tax on such gasoline. The failure by the petitioners to do the impossible is hardly a proper aid to a construction of the statute in question.

The argument now advanced on behalf of petitioners does, however, serve the purpose of bringing sharply to the attention of the Court the crux of the controversy involved in this case with respect to the gasoline which is imported into the State of Wyoming by the respondent and used by the respondent exclusively in propelling its airplanes in interstate commerce. In order to sustain the tax imposed by the

Wyoming statute upon such gasoline, it is necessary for the petitioners to argue that the word "use" and the words "used for domestic consumption," as employed in the statute, mean, with respect to respondent, the storage of gasoline and its withdrawal from storage within the State.

The words "use" and "used for domestic consumption," as employed in paragraphs 2 and 3 of the Wyoming statute, are apparently so employed in their ordinary sense. The word "use" alone implies an application of the thing itself, or, as stated by Webster, "the act of employing anything or applying it to one's service; the state of being so employed or applied." This meaning of the word "use" was accepted and applied by this Court to a statute imposing a tax "upon the use of a foreign-built yacht" in the case of *Billings v. U. S.*, 232 U. S. 261. The word "consumption" qualifies the word "use" in paragraph 2 of the statute, wherein it is provided that there is levied "a license tax * * * on all gasoline used or sold in this State for domestic consumption." The statute clearly states that the use of gasoline which is subject to the tax is a use for domestic consumption. The retention of gasoline in storage for some future disposition, or the mere withdrawal from storage does not result in the "consumption" of the gasoline. It is well-known that the gasoline tax was designed to compel the owners of motor vehicles to contribute to the construction

and maintenance of highways. A motor vehicle uses gasoline by consuming it. It is absurd to contend that the Wyoming legislature intended to impose a tax upon the storage or withdrawal from storage of gasoline by a statute which taxes "gasoline used for domestic consumption."

The significance of the word "use," as employed in the Wyoming statute, is made plain by subdivision 2 of Section 1, defining gasoline. This section provides that "gasoline is hereby defined as a volatile substance produced from petroleum * * * and such other volatile and inflammable liquids produced or compounded for the purpose of operating or propelling motor vehicles * * *." This language indubitably indicates that at the time this legislation was enacted the legislature was thinking in terms of the operation and propulsion of vehicles by the generation of motive power through the use of gasoline. When, therefore, in the succeeding paragraph of Section 2, the legislature imposed the tax on all gasoline *used for domestic consumption*, and in paragraph 3 provided for the payment of the tax by wholesalers upon all gasoline *used by them*, and upon every person who should *use* any gasoline in the State upon which the tax has not been paid by any wholesaler in the State, it meant by the word "use" such a use and such a use only as would necessarily result in the consumption or exhaustion of the gasoline.

Respondent is unfamiliar with any reported decision which supports petitioners' contention that the tax upon gasoline used, as imposed by the Wyoming statute, is not a tax upon the use of gasoline as used by respondent's planes. In the cases of *Bowman v. Continental Oil Co.,* 256 U. S. 642; *Hart Refineries v. Harmon,* 278 U. S. 499, and *Helson v. Kentucky,* 279 U. S. 245, it is clear that this Court viewed a tax upon the use of gasoline as a tax upon its consumption.

The petitioners attempt to distinguish the instant case from *Helson v. Kentucky, supra,* upon the ground that in the instant case the gasoline came to rest within the State of Wyoming before its use by respondent's planes in interstate commerce. The mere fact that the gasoline came to rest in the taxing state prior to its use in interstate commerce is unimportant. In *State Freight Tax Case,* 15 Wall. 232, a State tax imposed upon freight taken up within the State and carried out of it was held invalid. The fact that the property on which the tax was imposed originated within the taxing State did not validate the tax. Likewise, in the instant case, the tax is not based upon the situs of the gasoline but upon its use and that use is in interstate commerce.

It is true that in this Court's recent decision in *The Nashville C. & St. L. R. Co. v. Wallace,* No. 176, decided February 6, 1933, it is said that where gasoline has come to rest in storage the State is free to tax it

as it would any other property in the State, notwithstanding its prospective use as an instrument of interstate commerce. It is further said that the power to tax property, which means the taxation of the sum of all the rights and powers incident to ownership, necessarily includes also the power to tax its constituent elements. The Court, however, plainly says, in exactly the same connection, that these principles do not confer upon the State the right to tax property, or the elements of property, by a tax directly imposed upon the use of the property in interstate commerce.

The tax imposed by the Tennessee Act involved in the case of *The Nashville, etc., Ry. Co. v. Wallace, supra,* was expressly a privilege tax imposed upon persons and corporations "engaged in or carrying on the business * * * of selling or storing or distributing gasoline * * *." Insofar as the tax was imposed upon persons engaged in storing gasoline, it was measured by the amount withdrawn from storage, whether such withdrawal was for sale or other use. Hence, the tax was distinctly imposed upon a privilege connected with the ownership of property, which in and of itself could be completely exercised before any use was made of the gasoline in interstate commerce; as could also the privilege of selling gasoline which was the subject of the tax in *Eastern Air Transport v. South Carolina Tax Comm.,* 285 U. S. 147. But, as has been pointed out above, the Wyoming statute does not attempt t

impose the tax upon the storage of gasoline or its withdrawal from storage. Except for the tax on gasoline sold, it is only the use which is taxed, and this "use," as applied to the gasoline placed by the respondent in its airplanes at the airports in the State of Wyoming for propelling said airplanes in carrying on respondent's interstate commerce business, can mean only the use of such gasoline in interstate commerce. The case at bar is therefore within the principle of *Helson v. Kentucky,* 279 U. S. 245, and not within the principle of *Eastern Air Transport v. South Carolina Tax Commission,* 285 U. S. 147, or *The Nashville, etc. Ry. Co. v. Wallace,* decided February 6, 1933.

III.

THE ACT UNDER WHICH THIS TAX IS IMPOSED IS PURELY A REVENUE MEASURE AND ITS IMPOSITION UPON THE USE OF GASOLINE BY THE RESPONDENT'S PLANES IN INTERSTATE COMMERCE IS IN NO SENSE AN EXACTION OF COMPENSATION FOR THE USE OF THE CHEYENNE AND ROCK SPRINGS AIRPORTS.

In the supplemental brief of petitioners the following statement appears:

> "The District Judge sustained the tax as compensation to the cities for the facilities furnished and their outlay in maintenance and upkeep of the air fields. We do not deem it necessary to cite additional authorities to those relied on by him. He having found the compensation reason-

able, we think this finding will be accepted by this Court (R. 126-131)."

In their brief and argument before the Circuit Court of Appeals petitioners practically abandoned their contention that the tax in question was in effect an exaction of compensation for the use of the Cheyenne and Rock Springs Airports. The Circuit Court of Appeals did not rest its decision upon any such ground. In petitioners' petition for rehearing before the Circuit Court of Appeals no mention was made of this contention. In their brief filed in this Court in support of their petition for writ of certiorari the point was not suggested. However, in view of the fact that petitioners have raised the point in their supplemental brief, respondent feels compelled to point out briefly to this Court the reasons why there is no merit in the contention.

The District Court held that since the proceeds of the tax on gasoline collected at any municipal field were returned by the State to the municipality for the purpose of maintaining and improving the field, the tax was in effect an exaction of compensation for the use of the field. For the reasons hereinafter assigned, respondent submits that the tax was a true tax and in no sense an exaction of compensation for the use of the Cheyenne and Rock Springs airports.

A. The Power to Exact Compensation for the Use of Municipal Airports Is in the Municipality Owning the Airport and Is Not in the State of Wyoming.

By Section 5 of Chapter 72 of the Session Laws of 1927, the State of Wyoming authorized and empowered municipal corporations to acquire lands for airport purposes and to lease or let any such airport upon terms deemed satisfactory. Pursuant to this power conferred on municipalities, the cities of Cheyenne and Rock Springs acquired airports and thereafter entered into leases with respondent, whereby, in consideration of certain fixed rentals and other covenants to be performed by the respondent, the nonexclusive use of the landing fields was granted to the respondent (R. 69, 80). The cities of Cheyenne and Rock Springs having acquired airports pursuant to legislative act, it would seem clear that only those cities could fix the compensation to be paid for the use of the airports. It is also clear that the legislature, having granted power to the cities to lease their airports upon terms deemed satisfactory, did not intend, by the gasoline tax act, to prescribe the compensation to be paid for the use of the airports.

The power to exact compensation for the use of the Cheyenne and Rock Springs airports was in the cities owning those airports. The gasoline tax in question was exacted by the State of Wyoming. The cities,

having acquired the airports, alone had the power to determine the compensation to be paid for their use. The conclusion must follow that the State of Wyoming, in imposing the gasoline tax, was not seeking to exact compensation for the use of facilities entirely under the control of the cities of Cheyenne and Rock Springs.

B. There Is No Sufficient Relation Between the Gasoline Tax and the Use Made of the Airports to Justify Holding That the Tax Is a Charge Made Merely as Compensation for Such Use.

This Court has, on several occasions, rejected the contention that a certain tax was an exaction of compensation for the use of a facility when it appeared that there was no necessary relationship between the payment of the tax and the use of the facility.

The case of *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, is particularly applicable to the case at bar. In this case there was involved a tax levied by the State of Tennessee upon concerns operating interstate motor buses upon the highways of the State, graduated according to carrying capacity. It was held that the tax was invalid because there was not a sufficient relationship between the measure employed and the extent or manner of use of the State highways such as would justify a holding that the tax was a

charge made merely as compensation for the use of the highways by interstate buses. This Court said:

> "But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. *Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state. Clark v. Poor,* 274 U. S. 554, *supra.* In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except insofar as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, *there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate buses.* We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory." (Italics are ours.)

As this Court clearly states in the foregoing case, in order to render valid a burden upon interstate commerce as a charge for the use of a facility, it must appear that the charge made is necessarily predicated upon the use of the facility.

Although it may be urged that the more respondent uses the fields of Cheyenne and Rock Springs, the more gasoline it will use, and, consequently, the greater its tax, nevertheless such a statement can be nothing more than a rough approximation. There is no necessary connection between the amount of the tax and the amount of use of the airport by the person paying the tax.

As an illustration, compare the use made of the Cheyenne airport by the respondent with that by a company that does not engage in interstate commerce, but simply makes local flights from the airport. On its eastbound trips the respondent lands at Cheyenne and places sufficient gasoline in its tanks to carry the planes to at least its next stop, which is North Platte, Nebraska, and on its westbound trips the plane lands at Cheyenne and sufficient gasoline is placed in its tanks to carry it to Rock Springs (R. 101). Obviously, the respondent's planes will not land at the Cheyenne airport as often as they would if respondent did a similar amount of flying in a local business with practically all of its landings upon the Cheyenne field. It appears from the evidence that there is a company using the Cheyenne field engaged in a purely local business (R. 100). Undoubtedly, this company pays much less in taxes in proportion to the amount that it uses the field than does respondent. Similar inequalities must necessarily result from the fact that the amount of the

tax is not at all dependent upon the amount of use that the taxpayer makes of the airport.

It is clear from the foregoing that a tax or charge which is not in some reasonable manner measured by the use of the facility cannot be regarded as compensation for such use. To this effect was the decision in the case of *Sprout v. South Bend*, 277 U. S. 163, wherein this Court held invalid a license fee imposed by the City of South Bend upon motor buses using the city streets, the Court saying:

> "A flat tax, substantial in amount and the same for buses plying the streets continuously in local service and for buses making, as do many interstate buses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the highways."

In the instant case the existence of leases between the Cities of Cheyenne and Rock Springs and the respondent, wherein the respondent is granted the right to use the municipal airports of those cities upon the payment by respondent of certain rentals, is further proof that there is no sufficient relation between the tax and the use made of the airports by the respondent to justify a holding that the tax is a charge for the use of the airports.

IV.

If the Tax Imposed on Gasoline Taken Into Respondent's Planes on the Cheyenne Airport for Use in Interstate Commerce Is Construed as an Exaction of Compensation for the Use of the Cheyenne Airport, It Is in Violation of Section 10, Article I, of the Constitution of the United States Because It Impairs the Obligation of That Contract Between the Respondent and the City of Cheyenne Dated July 1, 1929, and Entered Into Prior to the Effective Date of the Statute Under Which the Tax Is Imposed.

Certain provisions of the lease between the City of Cheyenne and the respondent, appearing in full on pages 80-89 of the Record, are hereinafter summarized:

(1) Term: 25 years, commencing July 1, 1929.

(2) The Company agrees to pay an annual rental of $4050 for a certain hangar and space for the erection of an additional hangar.

(3) Paragraph 14 provides:

> "The City agrees that the Boeing Company shall be entitled to the full use of said municipal field and landing field during the term hereof on terms as favorable as may be granted by the City to any other user thereof, and *that no charge shall be exacted from the Boeing Company for any use which it may make thereof additional to that herein specifically provided.*" (Italics are ours.)

(4) And paragraph 20 provides that the City will "impose no charge of any kind or character upon materials and/or products purchased or otherwise acquired by the Boeing Company for use on the premises herein leased."

It is important to bear in mind that the above lease was entered into approximately six months prior to the date upon which the Tax Act was amended to give municipalities the taxes upon gasoline collected at their airports. Prior to this amendment there was no possible basis for a contention that the tax was in the nature of an exaction of compensation for the use of airports. We therefore have a situation wherein the City of Cheyenne, after agreeing upon a fixed compensation for the use of its airport, claims that it is entitled to additional compensation by reason of legislation passed subsequent to the date of its agreement. It is at once clear that the imposition of this tax as compensation for the use of the airport would constitute a violation of Section 10 of Article I of the Constitution of the United States. The obligation of the City of Cheyenne to give the respondent the use of the airport under the terms provided in the lease would be substantially impaired if the City was allowed to exact compensation from the respondent in addition to that provided for in the lease.

Decisions of this Court make it clear that the exaction of compensation in addition to that provided

in the lease would constitute an impairment of the obligation of contract.

In the case of *Boise Artesian H. & C. Water Co. v. Boise City,* 230 U. S. 84, the City had granted a franchise authorizing the laying of water pipes in the streets of the city, without exacting any compensation therefor. The franchise was accepted and the grantees and their successors invested a large amount of money in the construction of a water system for the purpose of supplying inhabitants of the city with water. Subsequently, the City enacted an ordinance requiring the Water Company to pay a license fee of $300 a month for the privilege of laying and maintaining its water pipes in the streets. This Court held that the ordinance imposing the license fee impaired the obligation of the franchise contract under which the water pipes were maintained in the streets, and was therefore void.

In the above case there was no express provision in the ordinance prohibiting the imposition of additional charges. In the instant case the impairment of the obligation of contract is even more apparent than in the above case because the respondent and the City of Cheyenne expressly agreed that no additional charges for the use of the airport would be imposed. If the tax imposed on gasoline taken into respondent's planes on the Cheyenne airport for use in interstate commerce is construed as an exaction of compensation

for the use of that airport, the imposition of the tax unquestionably impairs the obligation of that contract between the respondent and the City of Cheyenne, dated July 1, 1929, and entered into prior to the effective date of the statute under which the tax is imposed.

Dartmouth College v. Woodward, 4 Wheat. 518;
Murray v. Charleston, 96 U. S. 432;
Coolidge v. Long, 282 U. S. 582;
Carondelet Canal Co. v. Louisiana, 233 U. S. 362.

CONCLUSION.

The Circuit Court of Appeals was of the opinion that the Wyoming tax did not apply to gasoline brought into Wyoming by respondent for use in respondent's planes in interstate commerce. If the view of the Circuit Court is adopted by this Court, the necessity of a decision upon the validity of the Wyoming statute, as applied to such gasoline, is avoided. If the tax does apply to such gasoline, it falls upon the use of the gasoline in interstate commerce. It is clear from the language of the statute and the facts in this case that it is the actual consumption of the gasoline upon which the tax is imposed. Under the decision of *Helson v. Kentucky, supra,* such a tax imposes an unlawful burden upon interstate commerce.

The contention raised by the petitioners, but not pressed, that the tax in question is an exaction of

compensation for the use of the municipal airports at Cheyenne and Rock Springs, is without merit. The power to exact compensation for the use of these airports is in the municipalities owning them and not in the State of Wyoming. Furthermore, under the decisions of this Court, there is not a sufficient relation between the tax and the use made of the airports to justify holding that the tax is a charge made merely as compensation for such use. In any event, if the tax is construed as an exaction of compensation for the use of the Cheyenne Airport it is in violation of Section 10 of Article I of the Constitution of the United States, because it impairs the obligation of the lease between the respondent and the City of Cheyenne entered into prior to the effective date of the statute under which the tax is imposed.

Respectfully submitted,

JOHN W. LACEY,
Cheyenne, Wyoming,

ELMER E. TODD,
FRANK E. HOLMAN,
WILLIAM M. ALLEN,
CLARENCE R. INNIS,
Seattle, Washington,
Attorneys for Respondent.

APPENDIX

SESSION LAWS OF WYOMING, 1923.

CHAPTER 73

HOUSE BILL NO. 70.

GASOLINE TAX.

AN ACT providing a license tax on gasoline, providing for the collection thereof, defining certain words or phrases, prescribing manner and methods of payment, fixing penalties for failure to make same, and providing for the disposition of said taxes.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WYOMING:

DEFINITIONS.

Section 1. The words and phrases used in this Act shall be construed for the purpose thereof, as follows: (1) "Wholesaler" is hereby defined as any person, firm or corporation who imports or causes to be imported gasoline, as herein defined, for sale in the State of Wyoming to the jobber or consumer, or to the persons, firms, corporations or associations of persons, who, in turn, sell to the jobber or consumer. The term "wholesaler" is further defined to mean any person, firm or corporation who produces, refines, manufacturers, blends or compounds gasoline in the State of Wyoming for use, sale or distribution in this State. (2) "Gasoline" is hereby defined as the volatile substance produced from petroleum, natural gas, oil shales or coal, heretofore sold under the name of gasoline, and such other volatile and inflammable liquids produced or compounded for the purpose of operating or propelling motor vehicles, except the product commonly known as kerosene.

AMOUNT OF TAX.

Section 2. A license tax of one cent per gallon is hereby levied on all gasoline sold in this State after March 1, 1923, for domestic consumption, to be collected as hereinafter set forth:

REPORT—PAYMENT OF TAX.

Section 3. On and after May 1st, 1923, each and every wholesaler as defined in this Act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents, in this State, in the sale or use of gasoline as herein defined, shall not later than the fifteenth of each month render to the State Treasurer a statement of all gasoline sold or used by them in the State of Wyoming during the preceding calendar month, and pay to the State Treasurer at the same time, the license tax of one cent per gallon on all such gasoline. Said statement to the State Treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner or managing agent in the case of an individual, firm, or association, by the resident general agent or attorney, in the case of a foreign corporation, or by one of the principal officers in the case of domestic corporation.

RECORD BY WHOLESALER.

Section 4. Every wholesaler in gasoline as in this Act defined shall keep a record of all purchases, receipts, sales and distribution of gasoline; such records shall at all times be subject to inspection by the State Treasurer or his deputies or such other officers duly authorized by the State Treasurer.

FUNDS USED FOR MAINTENANCE OF HIGHWAYS.

Section 5. All funds received by the State Treasurer from the gasoline license tax provided in this Act, shall be

placed to the credit of the State Highway Fund for maintenance, and shall be apportioned between the several counties of the State in proportion to the number of miles of designated State Highways therein.

VIOLATION—PENALTY.

Section 6. It shall be unlawful for any such wholesaler, as herein defined, of gasoline, or other products subject to said tax, to sell or offer the same for sale in the State of Wyoming while delinquent in the payment of the whole or any part of the tax due and payable hereunder, and any such wholesaler who fails or refuses to pay the tax hereinbefore provided for at the time the same becomes due, shall be liable for double the amount thereof to be recovered in a suit instituted by and in the name of the State of Wyoming in any court of competent jurisdiction, in which suit, upon application made by the State of Wyoming, a writ of injunction may be issued against the defendant or defendants without requiring any bond, enjoining and restraining them from selling or attempting to sell or offer for sale in the State of Wyoming any gasoline or other products subject to said tax, while the whole or any part of the tax due from such defendant remains unpaid, and in such suit the court may, upon application made by the State of Wyoming, appoint a receiver of the property and business of the defendant, for the purpose of impounding the same as security for the payment of said delinquent tax and any judgment recovered in said suit. The State Treasurer or his assistant or deputies shall have the right, during business hours, to inspect the books and records of any party subject to said tax, for the purpose of determining the amount of the tax due and payable and whether the same has been paid. Any party violating any of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction

thereof by any court of competent jurisdiction shall be subject to a fine of not less than five hundred dollars and not more than one thousand dollars, or to imprisonment for six months, or both such fine and imprisonment. The remedies herein provided shall be cumulative.

VALIDITY.

Section 7. The invalidity of any section, subdivision, paragraph, provision, sentence, or clause of this Act shall not in any manner effect the validity of the remaining portions thereof.

EXCEPTION.

Section 8. Said gasoline license tax shall not be imposed on gasoline when exported or sold for exportation from the State of Wyoming to any other State or Nation.

PROSECUTION.

Section 9. Upon request of the State Treasurer, it shall be the duty of the Attorney General to commence and prosecute to final determination in any court of competent jurisdiction, any and all necessary action or actions at law, to enforce the provisions of this Act.

Section 10. This Act shall take effect and be in force from and after the first day of April, 1923.

Approved February 26, 1923.

SESSION LAWS OF WYOMING, 1925.

CHAPTER 89.

ORIGINAL HOUSE BILL NO. 13.

GASOLINE TAX.

AN ACT to amend and re-enact Sections 2, 3, and 5, Chapter 73, Session Laws of Wyoming, 1923, providing a license tax on gasoline and providing for the disposition of such license taxes, and display of price signs by dealers in gasoline and prescribing penalty for violation.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WYOMING:

Section 1. Section 2, Chapter 73, Session Laws of Wyoming, 1923, is hereby amended and re-enacted to read as follows:

AMOUNT OF TAX.

"Section 2. A license tax of two and one-half cents per gallon is hereby levied on all gasoline used or sold in this State after March 1, 1925, for domestic consumption, to be collected as hereinafter set forth."

Section 2. Section 3, Chapter 73, Session Laws of Wyoming, 1923, is hereby amended and re-enacted to read as follows:

COLLECTION AND STATEMENT OF AMOUNT COLLECTED.

"Section 3. On and after March 1, 1925, each and every wholesaler as defined in this Act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents in this State, in the sale or use of gasoline as herein defined shall not later than the fifteenth of each month,

render to the State Treasurer a statement of all gasoline sold or used by them in the State of Wyoming during the preceding calendar month, and pay to the State Treasurer at the same time, the license tax of two and one-half cents per gallon on all such gasoline. Said statement to the State Treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner or managing agent in the case of an individual, firm, or association, by the resident general agent or attorney, in the case of a foreign corporation or by one of the principal officers in the case of a domestic corporation."

Section 3. Section 5, Chapter 73, Session Laws of Wyoming, 1923, is hereby amended and re-enacted to read as follows:

APPORTIONMENT OF FUNDS DERIVED.

"Section 5. All funds received by the State Treasurer from the gasoline license tax provided in this Act, shall be placed to the credit of the State Highway Fund for maintenance, and shall be apportioned between the several counties of the State in proportion to the number of miles of designated State Highways therein."

DISPLAY OF SIGN.

Section 4. Each retail dealer in gasoline may prominently display in a conspicuous place near the gasoline filling pump a sign at least twelve inches square containing a legible and plainly printed statement in the English language showing the amount of State license tax and the total retail price per gallon of gasoline.

Section 5. This Act shall take effect and be in force from and after April 1, 1925.

Approved February 25, 1925.

CHAPTER 70.

ORIGINAL HOUSE BILL NO. 68.

GASOLINE SALES TAX.

AN ACT to amend and re-enact Section 2 and 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Sections 1 and 2, Chapter 89, Session Laws of Wyoming, 1925, and to amend and re-enact Section 4 of Chapter 89, Session Laws of Wyoming, 1925, relating to display of price signs by dealers and providing a penalty for violation thereof; providing a license tax on gasoline and for the collection and statement of the amount of tax collected.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WYOMING:

Section 1. Section 2, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 1, Chapter 89, Session Laws of Wyoming, 1925, is hereby amended and re-enacted to read as follows:

GASOLINE TAX.

"Section 2. A license tax of three cents per gallon is hereby levied on all gasoline used or sold in this State after March 1, 1927, for domestic consumption to be collected as hereinafter set forth."

Section 2. Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 2, Chapter 89, Session Laws of Wyoming, 1925, is hereby amended and re-enacted to read as follows:

PAYMENT OF TAX.

"Section 3. On and after March 1, 1927, each and every wholesaler as defined in this Act, who is now engaged or

who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents in this State, in the sale or use of gasoline as herein defined shall not later than the fifteenth of each month, render to the State Treasurer a statement of all gasoline sold or used by them in the State of Wyoming during the preceding calendar month, and pay to the State Treasurer at the same time, the license tax of three cents per gallon on all such gasoline. Said statement to the State Treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner or managing agent in the case of an individual, firm or association, by the resident general agent or attorney, in the case of a foreign corporation or by one of the principal officers in the case of a domestic corporation. Every person who shall use any gasoline in this State upon which the said tax has not been paid by any wholesaler in this State, shall, on or before the 25th day of each calendar month, beginning with the second calendar month after this Act has become effective, render a true statement to the State Treasurer, duly signed and sworn to, and accompany such statement with the payment of a tax of three cents per gallon on all gasoline as shown by such statement to have been used by him."

Section 3. Section 4, Chapter 89, Session Laws of Wyoming, 1925, is amended and re-enacted to read as follows:

DISPLAY OF SIGN.

"Section 4. Every person, firm or corporation, who shall have in his possession, for the purpose of sale or who shall sell or offer for sale to the retail trade, gasoline for use in motor vehicles, shall display in a conspicuous place a sign stating the price at which said gasoline shall be sold and the amount of tax thereon. And any person, firm or

corporation who shall neglect to so give the notice provided for in this Act, or who shall violate any of the provisions of this Act, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than twenty-five ($25.00) dollars, nor more than one hundred ($100.00) dollars or by imprisonment in a County Jail for not less than ten days nor more than thirty days, or by both such fine and imprisonment."

Approved February 26, 1927.

SESSION LAWS OF WYOMING, 1929.

CHAPTER 139.

ORIGINAL HOUSE BILL NO. 159.

GASOLINE TAX.

AN ACT to amend and re-enact Sections 2 and 3, Chapter 73, Session Laws of Wyoming, 1923, as amended by Sections 1 and 2, Chapter 70, Session Laws of Wyoming, 1927, and to amend and re-enact Section 5, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 3, Chapter 39, Session Laws of Wyoming, 1925, and to amend and re-enact Section 6, Chapter 73, Session Laws of Wyoming, 1923; providing for a license tax on gasoline, and for the collection and statement of the amount of tax collected; providing for the disposition of said taxes, and fixing penalties for violation of any of the provisions of this Act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WYOMING:

Section 1. Section 2, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 1, Chapter 70, Session Laws of Wyoming, 1927, is hereby amended and re-enacted to read as follows:

AMOUNT OF TAX.

"Section 2. A license tax of four cents per gallon is hereby levied on all gasoline used or sold in this State after April 1, 1929, for domestic consumption to be collected as hereinafter set forth."

Section 2. Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 2, Chapter 70, Session Laws of Wyoming, 1927, is hereby amended and re-enacted to read as follows:

PAYMENT OF TAX.

"Section 3. On and after April 1, 1929, each and every wholesaler as defined in this Act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents in this State in the sale or use of gasoline as herein defined, shall not later than the fifteenth of each month, render to the State Treasurer a statement of all gasoline sold or used by them in the State of Wyoming during the preceding calendar month, and pay to the State Treasurer at the same time, the license tax of four cents per gallon on all such gasoline. Said statement to the State Treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner or managing agent in the case of an indiviual, firm or association, by the resident general agent or attorney, in the case of a foreign corporation or by one of the principal officers in the case of a domestic corporation."

Section 3. Section 5, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 3, Chapter 89, Session Laws of Wyoming, 1925, is hereby amended and re-enacted to read as follows:

DISTRIBUTION OF MONEY RECEIVED FROM TAX.

"Section 5. Seventy-five per centum of all funds received by the State Treasurer from the gasoline license tax provided for in this Act, shall be placed to the credit of the State Highway Fund for maintenance, improvement and asphalt oil surfacing for State Highways and shall be apportioned between the several counties of the State in proportion to the number of miles of designated State Highways therein. The remaining twenty-five per centum shall be apportioned by the State Treasurer between the several counties of the State, thirty per centum in the ratio which

the area of the county bears to the total area of the State, excepting areas included in National Parks; thirty per centum in the ratio which the rural population of the county bears to the total rural population of the State according to the last available State or Federal census, and forty per centum in the ratio which the assessed valuation of the county bears to the latest total assessed valuation of the State, and on July 15th, and quarterly thereafter, he shall pay same to the respective county treasurers who shall credit the same to the county road fund; Provided that seventy-five per centum of all refunds or other expense paid by the State Treasurer according to law, shall be charged to the State Highway Fund, and twenty-five per centum to the fund to be apportioned among the counties."

Section 4. Section 6, Chapter 73, Session Laws of Wyoming, 1923, is hereby amended and re-enacted to read as follows:

VIOLATION—PENALTY.

"Section 6. It shall be unlawful for any such wholesaler, as herein defined, of gasoline, or other products subject to said tax, to sell or offer the same for sale in the State of Wyoming while delinquent in the payment of the whole or any part of the tax due and payable hereunder, and any such wholesaler who fails or refuses to pay the tax hereinbefore provided for at the time the same becomes due, shall be liable for double the amount thereof to be recovered in a suit instituted by and in the name of the State of Wyoming in any court of competent jurisdiction, in which suit, upon application made by the State of Wyoming, a writ of injunction may be issued against the defendant or defendants without requiring any bond, enjoining and restraining them from selling or attempting to sell or offer for sale in the

State of Wyoming any gasoline or other products subject to said tax, while the whole or any part of the tax due from such defendant remains unpaid, and in such suit the court may, upon application made by the State of Wyoming, appoint a receiver of the property and business of the defendant, for the purpose of impounding the same as security for the payment of said delinquent tax and any judgment recovered in said suit. The State Treasurer or his assistant or deputies shall have the right, during business hours, to inspect the books and records of any party subject to said tax, for the purpose of determining the amount of the tax due and payable and whether the same has been paid. Any party violating any of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof by any court of competent jurisdiction, shall be subject to a fine of not less than fifty dollars and not more than two hundred dollars, or to imprisonment for one month, or to both such fine and imprisonment. The remedies herein provided shall be cumulative."

Section 5. This Act shall take effect and be in force from and after April 1, 1929.

Approved February 25, 1929.

CHAPTER 14.

HOUSE BILL NO. 6.

PAYMENT OF GASOLINE TAX.

AN ACT to amend and re-enact Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 2, Chapter 70, Session Laws of Wyoming, 1927, as amended and re-enacted by Section 2, Chapter 139, Session Laws of Wyoming, 1929, providing for a license tax on gasoline and for the collection thereof and providing for statements of gasoline sold or used by wholesalers or users and the payment of the tax by them; and providing for the disposition of the tax from gasoline used on municipal air fields and fixing penalties for violation of any of the provisions of this Act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WYOMING:

Section 1. Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 2, Chapter 70, Session Laws of 1927, as amended and re-enacted by Section 2, Chapter 139, Session Laws of Wyoming, 1929, is hereby amended and re-enacted to read as follows:

"Section 3. On and after April 1, 1929, each and every wholesaler as defined in this Act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents in this State, in the sale or use of gasoline as herein defined, shall not later than the fifteenth of each month, render to the State Treasurer a statement of all gasoline sold or used by them in the State of Wyoming during the preceding calendar month, and pay to the State Treasurer at the same

time, the license tax of four cents per gallon on all such gasoline. Said statement to the State Treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner or managing agent in the case of an individual, firm or association, by the resident general agent or attorney, in the case of a foreign corporation or by one of the principal officers in the case of a domestic corporation. Every person, firm or corporation, who shall use any gasoline in this State, upon which the said tax has not been paid by any wholesaler in this State, shall, on or before the 15th day of each calendar month, beginning with the first calendar month after this Act has become effective, render a true statement to the State Treasurer, duly signed and sworn to, and accompany such statement with the payment of a tax of four cents per gallon on all gasoline as shown by such statement to have been used by him; provided that before making the distribution of funds provided for in Section 1 hereof, the State Treasurer shall pay over all funds received from the gasoline license tax on gasoline used at any municipal air field to the city or town where such air field is located, to be used for the maintenance and improvement of such air field."

Section 2. Any party violating any of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof by any court of competent jurisdiction, shall be subject to a fine of not less than fifty dollars and not more than two hundred dollars, or to imprisonment for one month, or to both such fine and imprisonment.

Section 3. All Acts or parts of Acts in conflict with this Act are hereby repealed.

Section 4. This Act shall take effect and be in force from and after its passage.

Approved December 23, 1929.

Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended by Section 1, Chapter 14, Session Laws of Wyoming, 1929, Special Session, and Section 5, Chapter 73, Session Laws of Wyoming, 1923, as amended by Section 3, Chapter 139, Session Laws of Wyoming, 1929, were amended by the Wyoming legislature in 1931. The 1931 Session Laws are not included because they were enacted subsequent to the institution of this suit. In the Appendix to the petition for writ of certiorari the Wyoming Gasoline Tax Law, as amended by the 1931 Session Laws, is set forth.